Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner*,

v.

JOHN DAVID STUMPF, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is a representation on the record from defendant's counsel and/or the defendant that defense counsel has explained the elements of the charge to the defendant, sufficient to show the voluntariness of the guilty plea under *Henderson v. Morgan*, 426 U.S. 637, 647 (1976)?

2. Does the Due Process Clause require that a defendant's guilty plea be vacated when the State subsequently prosecutes another person in connection with the crime and allegedly presents evidence at the second defendant's trial that is inconsistent with the first defendant's guilt?

LIST OF PARTIES

The Petitioner is Betty Mitchell, the Warden of the Mansfield (Ohio) Correctional Institution.

The Respondent is John David Stumpf, an inmate of Mansfield Correctional Institution.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Betty Mitchell, Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A, at 1a-58a. The United States District Court's unreported opinion and judgment denying the writ appear at Appendix C, at 61a-91a. The District Court's order denying Stumpf's motion to alter or amend judgment appears at Appendix D, at 92a-103a. The District Court's order granting a certificate of appealability appears at Appendix E, at 104a-120a. The Ohio Supreme Court's entry denying jurisdiction of Stumpf's motion for postconviction relief appears at Appendix O, at 235a, the opinion and judgment of the Ohio Fifth District Court of Appeals affirming the denial of Stumpf's motion for postconviction relief appears at Appendix N, at 227a-234a, and the trial court order denying

Stumpf's motion for postconviction relief appears at Appendix Q, at 237a-241a. The Supreme Court of Ohio's published decision and order on direct appeal appear at Appendix G, at 149a-177a. The opinion of the Ohio Fifth District Court of Appeals on direct appeal appears at Appendix J, at 180a-214a. The trial court's entry denying Stumpf's motion to withdraw his guilty plea appears at Appendix V, at 280a, the trial court's judgment on sentencing appears at Appendix L, at 217a-221a, the trial court's order accepting Stumpf's guilty plea appears at Appendix M, at 222a-226a, and the trial court's judgment entry finding Stumpf guilty of aggravated murder appears at Appendix K, at 215a-216a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 28, 2004. The Sixth Circuit denied the Warden's Petition for Rehearing and Suggestion for Rehearing En Banc on August 9, 2004. This Petition for Writ of Certiorari follows within 90 days of the Sixth Circuit's denial of rehearing. The Warden invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the Due Process Clause of the Fourteenth Amendment, and on the Fifth and Sixth Amendments to the United States Constitution.

The Due Process Clause of the Fourteenth Amendment provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

The Fifth Amendment provides, in relevant part:

[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .; [and] to be confronted with the witnesses against him . . .

INTRODUCTION

This case presents two issues of vital importance to the federal habeas review of the thousands of state convictions each year that are based on guilty pleas. In particular, the decision below adopted two unprecedented propositions of law that dramatically undercut the finality of such pleas. Together, these two propositions create a wholesale change in the legal landscape surrounding guilty pleas that warrants immediate review by this Court.

First, the court below exacerbated an existing conflict regarding the standards that apply to a defendant's claim that his plea was not voluntary because he was not informed of the elements of his crime. In *Henderson v. Morgan*, 426 U.S. 637, 646-47 (1976), this Court noted that, absent a specific factual finding that an element was not explained, it is typically appropriate to presume adequate explanation, even absent an express representation on the record that such explanation occurred. See also *Marshall v. Lonberger*, 459 U.S. 422, 437 (1983) ("Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted."). And, at least two circuits, the

Eighth and the Tenth, have concluded that, under *Henderson*, where counsel and/or the defendant had expressly represented to the state trial court that such an explanation occurred, the petitioner could not demonstrate that a plea was involuntary.

Two other circuits, however, including the Sixth Circuit in the decision below, have adopted a contrary approach. Here, for example, in a 2-1 decision over a vigorous dissent from Judge Boggs, the panel majority concluded that Stumpf's guilty plea was not voluntary. It did so despite the undisputed facts that the state trial court judge had specifically asked both Stumpf and his defense counsel whether counsel had explained the elements of the crime, and that both Stumpf and his counsel had answered yes. A case from the Eleventh Circuit has similarly rejected the view that a representation on the record by the defendant and defense counsel that the defendant understood the charge against him suffices to demonstrate voluntariness. See *Gaddy v. Linahan*, 780 F.2d 935, 945 (11th Cir. 1986) (". . . [C]onclusory responses by a defendant and his counsel to a court's inquiry into whether the defendant "understands" the charge is not sufficient to establish that the defendant actually has knowledge and understanding, particularly when he possesses minimal intelligence."). These decisions cannot be squared with *Henderson*, or its interpretation in the Eighth and Tenth Circuits. And, left uncorrected, they threaten to undermine the finality of state court guilty pleas.

The court below also worked one more important change to the ground rules for federal review of state convictions based on guilty pleas. In particular, the court—again over Judge Boggs' dissent—created a federal due process rule invalidating a petitioner's conviction if the petitioner can demonstrate that the State later presented evidence at a co-defendant's trial that is arguably inconsistent with the version of facts on which the petitioner's guilty plea

was based. Moreover, it concluded that this newly-discovered due process principle requires the earlier conviction to be vacated, even though the evidence presented at the co-defendant's trial was not known at the time the guilty plea was made and accepted. That is, the later-discovered evidence somehow transforms the previously valid guilty plea into an invalid plea. But no federal court of appeals—save the Sixth Circuit in the decision below—has ever recognized a federal right to collaterally attack a first defendant's conviction entered on a guilty plea merely because subsequently-discovered evidence is presented at a codefendant's later trial. The decision below is thus an unprecedented expansion of the grounds on which federal courts can set aside state court guilty pleas. This case presents an ideal vehicle for addressing this important issue.

The court below independently relied on each of these two propositions in granting relief to the petitioner. Thus, the State acknowledges that in order to ultimately prevail, it must establish that the court below erred on both. The court in fact did. But, in any event, this case warrants review because both of the propositions conflict with the holdings of this Court, and of other circuit courts, and each proposition carries dramatic consequences for the finality of state court convictions based on guilty pleas. The State accordingly urges this Court to grant review.

STATEMENT OF THE CASE AND FACTS

In May 1984, the Grand Jury for Guernsey County, Ohio, indicted John David Stumpf ("Stumpf") for the murder of Mary Jane Stout and the attempted murder of Norman Stout, and three other charges. The indictment included aggravating circumstances, making Stumpf eligible for the death penalty. See *State v. Stumpf*, 32 Ohio St. 3d 95, 97 (1987), at Appendix 153a.

As detailed in the Ohio Supreme Court opinion, Stumpf shot both Mary Jane Stout and Norman Stout, her husband, during the course of robbing the Stout's home. Mr. Stout survived two gunshot wounds to the head and testified at the factual basis hearing held in connection with Stumpf's plea. According to Mr. Stout, Stumpf and a codefendant, Wesley, gained entrance to the Stout's home by asking to use the telephone. Mr. Stout further testified that Stumpf forced Stout and his wife at gunpoint into a bedroom and then shot Stout between the eyes with a chrome-plated .25 caliber Raven automatic. Mrs. Stout was shot and killed after her husband was unconscious, and thus Stout did not see who shot her. *See State v. Stumpf*, 32 Ohio St.3d at 96, at Appendix 150a-151a.

On September 17, 1984, Stumpf pled guilty to aggravated murder and to the aggravating circumstance of killing Mrs. Stout to prevent her from testifying as a witness. Stumpf also pled guilty to the attempted aggravated murder of Norman Stout. In exchange for Stumpf's guilty pleas, the prosecutor agreed to drop two other specifications to the aggravated murder charge and the three other charges in the indictment. 32 Ohio St. 3d at 97, at Appendix 153a; Judgment Entry on Guilty Plea, at Appendix 222a-226a.

Consistent with Ohio law, the trial court questioned Stumpf concerning his understanding of the plea and the nature of the charged offenses. Stumpf's counsel told the trial court that "they have fully investigated the facts and law in this case and have informed the Defendant of all defenses available to him, and have further informed the Defendant of the nature of the offense of 'AGGRAVATED MURDER' as charged in the First Count[.]" Trial Court Judgment Accepting Guilty Plea, at Appendix 223a. The trial court asked defense counsel if they had informed Stumpf of the elements of the offenses with which he was charged, and the defense counsel responded affirmatively. Plea Hearing

Transcript, at Appendix 248a. Stumpf also affirmed for the trial court that his lawyers had so advised him. Plea Hearing Transcript, at Appendix 250a. The trial court accepted Stumpf's plea.

After a full mitigation hearing, the trial court sentenced Stumpf to death. Sentencing Opinion, at Appendix 217a. During that hearing, Stumpf admitted that he participated in the robbery of the Stouts' home and that he shot Norman Stout, but Stumpf claimed that the other participant in the robbery, Wesley, had shot Mary Jane Stout. 32 Ohio St. 3d at 97, at Appendix 154a.

Several months after Stumpf's conviction and sentencing, Wesley's cellmate offered to testify at Wesley's trial that Wesley admitted that he, not Stumpf, had shot Mary Jane Stout. It is uncontested that the cellmate first heard this supposed admission, and that the State first learned of it, after Stumpf's conviction. Transcript of Hearing on Motion to Withdraw Guilty Plea, at Appendix 270a-272a, 276a. At Wesley's trial, the jailhouse informant did in fact testify that Wesley told him that he had shot Mrs. Stout. 32 Ohio St. 3d at 104, at Appendix 169a-170a.

On June 7, 1985, approximately eight and a half months after his conviction was final, Stumpf filed a motion to withdraw his guilty plea in the trial court. Motion to Withdraw Plea, at Appendix 266a-268a. In this motion, Stumpf did not claim that he did not understand the elements of the offense to which he pled guilty. Instead, Stumpf sought to vacate his plea based on the fact that the State had presented evidence at Wesley's trial that it was Wesley, not Stumpf, who shot Mrs. Stout. On October 7, 1985, after reviewing both the jailhouse informant's and Wesley's testimony from Wesley's trial, the trial court denied Stumpf's motion. Judgment Entry, at Appendix 280a; see also

Transcript of Hearing on Motion to Vacate Plea, at Appendix 269a; *Stumpf v. Mitchell*, 367 F.3d 594, 617 (6th Cir. 2004), at Appendix 46a.

Stumpf filed a supplemental brief in the Fifth District Court of Appeals, raising his claims regarding the motion to withdraw his plea. The Fifth District Court of Appeals affirmed his conviction and the denial of his motion to vacate his guilty plea. See Appendix 201a-205a. Stumpf appealed to the Ohio Supreme Court. Both the Ohio appellate court and the Ohio Supreme Court rejected Stumpf's arguments. See *State v. Stumpf*, 32 Ohio St.3d at 98-108, at Appendix 156a-177a. In so doing, the Ohio Supreme Court expressly stated that Stumpf did not "claim that his plea was not entered knowingly, intelligently, and voluntarily." *Id.* at 106, at Appendix 170a. This Court denied certiorari. *Stumpf v. Ohio*, 484 U.S. 1079 (1988), at Appendix 178a-179a.

Stumpf further challenged his guilty plea with a state post-conviction action. The Ohio courts rejected his claims. See Appendix 227a-241a. This Court again denied certiorari. *Stumpf v. Ohio*, 502 U.S. 956 (1991), at Appendix 236a.

Stumpf then filed a petition for a writ of habeas corpus in federal District Court. In his Second Claim for Relief, Stumpf asserted that his guilty plea was not knowing, intelligent and voluntary because his attorneys told him that he could not be sentenced to death if he pled guilty. The District Court rejected this claim on the merits on February 7, 2001. See Appendix 62a-74a.

In Stumpf's Seventh Claim for Relief, he argued that he should have been granted a new trial because of the later-discovered evidence that his separately tried co-defendant, Wesley, was actually the shooter. Apparently, the District Court sua sponte raised the question whether the State's failure to allow Stumpf to withdraw his plea violated his right

to due process, insofar as the state prosecuted Stumpf's codefendant based on an "inconsistent theory." The District Court ultimately held that Stumpf's due process rights were not violated. See Appendix 85a-87a.

Stumpf appealed to the Sixth Circuit. There, Stumpf continued to claim that his guilty plea was invalid because (1) he received no benefit from pleading guilty, and (2) his attorney incorrectly told him that he would not be eligible for the death penalty if he pled guilty. Stumpf Sixth Circuit Brief at 71. However, Stumpf conceded in his Sixth Circuit brief that "the record suggests an air of regularity and a valid plea . . ." Stumpf Sixth Circuit Brief at 67.

The Sixth Circuit, in a 2-1 opinion with a dissent from Judge Boggs, granted habeas on two independent grounds. First, the Sixth Circuit held that Stumpf's guilty plea was constitutionally involuntary because he lacked understanding of the aggravated murder charge. Second, the court concluded that the State had violated Stumpf's right to due process by convicting Wesley on evidence—evidence that came to light after Stumpf conviction and sentence became final—that was inconsistent with Stumpf's plea. 367 F.3d at 618, at Appendix 48a.

In his dissent, on the first claim, Judge Boggs disagreed with the panel majority's "extensive exegesis of the 'confusion' at the plea hearing itself," concluding that ". . . Stumpf understood his legal strategy, executed it according to plan, and got exactly the opportunities that he bargained for, making the grant of a writ of habeas corpus unwarranted." *Id.* at 622, 623, at Appendix 57a, 58a. With regard to the second (inconsistent theories) claim, Judge Boggs observed that "[h]owever flawed a defendant's guilty plea might be, it cannot constitute a contradictory prosecutorial theory of guilt as required in [*Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000)]." 367 F.3d at 621, n.2

(Boggs, C.J., dissenting), at Appendix 54a. As Judge Boggs also noted, the record does not show that the prosecutor ". . . was remiss in relying on Stumpf's acknowledgment of guilt." 367 F.3d at 620, at Appendix 52a. "At most, the *existence* of [the cellmate's] statement could be argued to have rendered the conviction [of Stumpf] unreliable, but then [the] analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background . . ." 367 F.3d at 622, at Appendix 55a-56a (Boggs, C.J., dissenting), citing *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986), and *Herrera v. Collins*, 506 U.S. 390, 400 (1993). As Judge Boggs noted, "[i]t would indeed be bizarre if [the cellmate's] statement could not undermine Stumpf's conviction by its own force, but introducing it into another proceeding could do so." 367 F.3d at 622, at Appendix 55a-56a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit in this case has rendered a decision of broad importance which conflicts with decisions of other federal circuits, and which expands federal habeas corpus to permit vacating a guilty plea when new and different evidence is presented at the subsequent trial of a codefendant.

The Sixth Circuit decision below adopted two propositions of law that significantly expand the grounds for collaterally attacking in federal habeas proceedings state criminal convictions entered on pleas of guilty. The Sixth Circuit panel majority's new rules of constitutional law concerning the validity of guilty pleas warrant immediate review by this Court.

First, the decision below deepened an existing split regarding the standards that apply to a defendant's claim that his plea was not voluntary because he was not advised of the elements of the crime to which he pled guilty. At least two circuits have concluded under *Henderson v. Morgan*, above, that where counsel or the defendant represented on the record that counsel advised the defendant of the elements of the crime, the defendant failed to demonstrate that his plea was involuntary. But the Sixth Circuit below adopted a contrary approach. Despite Stumpf's and his defense counsel's affirmation to the trial court that counsel duly explained to Stumpf the elements of the crime with which he was charged, the court below determined Stumpf's plea was involuntary based on statements by Stumpf's counsel at the plea and factual basis hearings contesting that Stumpf actually fired the shots that killed the victim. This case accordingly presents the important issue of whether, consistent with *Henderson* and *Lonberger*, above, express affirmations on the record that defense counsel has advised the defendant of the elements of the crime satisfies the State's obligation to demonstrate that a guilty plea is voluntary.

Second, the decision below also created a federal due process rule invalidating a petitioner's conviction if he can demonstrate that the State later presented evidence at a codefendant's trial that is arguably inconsistent with the version of the facts on which the petitioner's guilty plea was based. The court below applied this principle even though the different evidence presented at the codefendant's trial was not known at the time the plea was entered. In doing so, the court dramatically expanded the ground on which petitioners can attack a first defendant's conviction entered on a guilty plea based on later-discovered evidence presented at a codefendant's subsequent trial. Because the decision below has wide-ranging implications for state convictions entered on guilty pleas, the Court should review the decision below.

A. The Sixth Circuit's decision holding Stumpf's guilty plea involuntary conflicts with this Court's decision in *Henderson v. Morgan*, and with decisions of the Eighth and Tenth Circuits.

The Sixth Circuit's decision below deepened an existing conflict regarding the standards that apply to a claim that a guilty plea was involuntary because the petitioner was not advised of the elements of the crime. That conflict implicates the standards that apply to the thousands of state convictions every year entered on guilty pleas. The conflict arises out of the proper interpretation of *Henderson v. Morgan*, 426 U.S. 637 (1976), and the standard for determining when the record of a plea hearing sufficiently supports the presumption that a defendant has been advised of the elements of the crime so that his guilty plea is voluntary.

In *Henderson v. Morgan*, 426 U.S. at 646-47, this Court considered the claim of a defendant, who had been charged with first degree murder, that his guilty plea to second degree murder was involuntary because he was not aware that intent to cause death was an element of the offense. In that case, the district court hearing the habeas petition specifically found that the defendant had not been advised about the intent element before he pled guilty. In sustaining the claim, the Court observed:

> Normally, the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of

> the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent . . .

Henderson v. Morgan, 426 U.S. at 646-647. See also *Marshall v. Lonberger*, 459 U.S. at 437 (rejecting challenge to validity of previous state court guilty plea; despite defendant's testimony in state court that he did not understand when he entered his plea that he was pleading guilty to attempted murder, state trial court implicitly found that testimony not credible) ("Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the sentencing proceedings, of the charges on which he was indicted.").

Consistent with *Henderson*, federal appellate court decisions have regarded the Court's decision in that case as limited to its "unique" facts in which the trial court found as fact that the defendant had not been advised that intent to kill was an element of the offense to which he pled guilty. See *Allen v. Mullin*, 368 F. 3d 1220, 1241 (10th Cir. 2004) ("[t]he narrowness of the Court's holding is evidenced by this passage in its opinion"), citing *Henderson*, 426 U.S. at 647; *Moore v. Armontrout*, 928 F.2d 288, 292 (8th Cir. 1991) ("We have previously refused to interpret *Henderson* broadly and refuse to do so here."); *Gregory v. Solem*, 774 F.2d 309, 315 (8th Cir. 1985) ("As Justice Stevens pointed out, the facts in *Henderson* were 'unique' because the state trial judge 'found as a fact the element of intent was not explained to the respondent'"); *McGuirk v. Fair*, 622 F.2d 597, 598 (1st Cir. 1980) ("The holding of *Henderson* was very narrow, however, and its facts are distinguishable from those of the instant case.").

Accordingly, the Eighth and Tenth Circuits have rejected federal habeas corpus claims to invalidate a conviction entered on a guilty plea where the state trial court record included express representations by counsel and/or the defendant that the defendant had been advised of the nature of the charge or the elements of the crime. In these cases, the circuits faced the common fact pattern where a defendant (and/or his counsel) confirms on the record of the plea hearing that counsel has explained the charge to the defendant, the plea is entered, and some time later, after the conviction is final, the defendant claims that he did not understand the charge. In *Allen v. Mullin*, 368 F. 3d at 1228, 1241-43, the Tenth Circuit held that the petitioner failed to overcome the *Henderson* presumption that he was informed by counsel of the intent element of the charged offense. There, Allen was charged by an information that recited the offense, including the intent element, Allen submitted a factual basis affidavit stating that he killed the victim without cause, and at the plea hearing, and Allen and his attorney assured the court that Allen had reviewed the charges with his counsel. *Allen*, 368 F.3d at 1242.

In *Moore v. Armontrout*, 928 F.2d at 292, the Eighth Circuit similarly rejected a challenge to the voluntariness of a guilty plea, noting that at Moore's guilty plea hearing, the charges were read to him and he responded affirmatively when asked if he had discussed the charges with his attorney. And, in *Gregory v. Solem*, 774 F.2d at 315, the Eighth Circuit held that the finding by the state court that Gregory understood the nature of the offense showed that his guilty plea was voluntary, and that the *Henderson* presumption that counsel explained the charge to him supported that finding, which, under *Sumner v. Mata*, 449 U.S. 539 (1981), was entitled to a "high measure of deference." These cases are consistent with the observation in *Henderson* (and *Lonberger*) that either an express representation by defense counsel on the record that the nature of the offense has been

explained to the defendant, or a presumption that counsel has done so, ordinarily suffices to show that the accused has sufficient information about what he is being asked to admit to render the plea voluntary. See *Henderson*, 426 U.S. at 646-47.

By contrast, the Sixth Circuit held that Stumpf's protestations that he did not actually kill Mrs. Stout required the state to show with extrinsic evidence in federal habeas corpus that Stumpf truly understood that specific intent was an element of the charge of aggravated murder. *Stumpf v. Mitchell*, 367 F. 3d 594, 608-610, at Appendix 30a (". . . [W]hen the state court record of a defendant's plea does not demonstrate that the plea is constitutionally adequate, the state bears the burden of showing the plea was voluntary, knowing and intelligent. Here, the state has presented no extrinsic evidence to counter the record of the proceedings discussed above."); *id.* at 607-08, at Appendix 28a (noting that although representations on the record by defense counsel that he advised the defendant of the elements of the crime typically suffice to show voluntariness of the plea, "[i]n this case, however, the record clearly establishes that Stumpf sought to preserve his right to argue that he was not the shooter and thus counterbalances the assurances given by defense counsel that they had explained the elements to Stumpf."); cf. *id.* at 623 (Boggs, C.J., dissenting).[1] The Sixth Circuit so held despite the Ohio Supreme Court's finding that Stumpf made *no* claim on appeal "that his plea was not entered knowingly, intelligently, and voluntarily," *State v. Stumpf*, 32 Ohio St. 3d at 104, at Appendix 170a, and despite the failure of Stumpf's counsel to make such a claim

[1] Cf. *Nash v. Israel*, 707 F.2d 298, 302-03 (7th Cir. 1983) (holding that defendant's guilty plea was not voluntary when he told the judge, when asked, that the charges had been explained to him, but he did not understand them) ("[W] e are presented with a case in which the intent element was not explained to Nash ... *after he explicitly stated that he did not understand the charge.*")(emphasis supplied).

"explicitly" in federal habeas corpus. See 367 F.3d at 600, at Appendix 12a ('Although Stumpf does not contend explicitly that his guilty plea was invalid because he was not aware that specific intent was an element of the crime to which he pleaded guilty . . .").

The Sixth Circuit's approach in *Stumpf* is similar to the ruling of the Eleventh Circuit in *Gaddy v. Linahan*, 780 F.2d 935, 944 n.10, 945 (11th Cir. 1986). The court in *Gaddy* remanded a habeas corpus claim for an evidentiary hearing on what, if any, information the petitioner received and understood, before pleading guilty, regarding the elements of malice murder, to which he pled guilty. While there was no express representation on the record of the plea hearing that defense counsel had advised Gaddy of the elements of the crime, 780 F.2d at 944, n.10, the prosecutor read the indictment to him at the plea hearing, and the defense counsel and Gaddy responded affirmatively when the trial court asked if Gaddy understood the charge. The court in *Gaddy* opined that conclusory affirmative responses by a defendant and his counsel to a court's inquiry into whether the defendant "understands" the charge are not sufficient to establish the defendant's actual knowledge and understanding, particularly when he possesses minimal intelligence. 780 F.2d at 945. In both *Stumpf* and *Gaddy*, the circuit courts disregarded the representations on the record of the plea hearing to the effect that the defendant had been advised of, or understood, the charge against him, to question the voluntariness of their guilty pleas.

The questions presented by these cases are: (1) under *Henderson*, 426 U.S. at 647, if the plea hearing record reflects a representation that the defense counsel explained the elements of the offense and/or any possible defenses, whether the burden ever shifts to the State to show that the defendant knowingly and voluntarily pled guilty; and (2) if so, whether a mere ambiguity in the plea colloquy is enough

to shift the burden to the State to prove by extrinsic evidence that the defendant actually understood the elements of the charged crime.

The Sixth and Eleventh Circuits' shifting of the burden of proof to the State runs counter to the generally narrow interpretation of *Henderson* by other circuits, and starkly conflicts with decisions by the Eighth and Tenth Circuits that require the habeas corpus petitioner to overcome the presumption that counsel fully explained the elements of the charged offense. The panel majority's decision in *Stumpf* also conflicts with the decisions of other State appellate courts relying upon the *Henderson* presumption, with or without an affirmation by the defendant and defense counsel on the plea hearing record that defense counsel explained the nature of the charges to the defendant. See, e.g., *State v. Fitzpatrick*, 102 Ohio St. 3d 321, 329 (2004) ("Moreover, the Constitution does not require that a trial court explain the elements of the charge, at least where the record contains a representation by defense counsel that the nature of the offense has been explained to the accused.")(citations omitted). In *Fitzpatrick*, the defense counsel affirmed that they had explained the charged offenses to him, and Fitzpatrick affirmed that he had spoken with his counsel and that he understood the charge. Fitzpatrick's statement at the sentencing hearing that he would not knowingly hurt the victims was insufficient to undermine the voluntariness of his guilty plea. *Id.* at 330. See also, e.g., *Ex Parte Smith*, 548 So.2d 1050, 1051-53 (Ala. 1989); *State ex rel. Collins v. Superior Court*, 157 Ariz. 71, 754 P.2d 1346, 1348 (1988); *State v. Lopez*, 269 Conn. 799, 801-02 (2004); *Wharton v. Anderson*, 270 Ga. 22, 23 (1998); *Gregory v. State*, 353 N.W.2d 777, 780-81 (S.D. 1984); *Sparks v. State*, 338 So.2d 550, 552 (Fla. 1st Dist. Ct. App. 1976); see also *People v. Fuller*, 205 Ill. 2d 308, 328 (2002) ("Given that the defendant's allegation to the contrary is *de hors* the record and was not properly raised or resolved in a post-

plea proceeding, the defendant has not overcome the presumption that counsel properly informed the defendant of the elements necessary to make him death eligible.").

In sum, review is warranted here because the Sixth Circuit's holding that Stumpf's guilty plea was involuntary directly conflicts with decisions of the Eighth and Tenth Circuits and the decisions of many State appellate courts.

B. The Sixth Circuit's holding that the subsequent "inconsistent" prosecution of Stumpf's codefendant rendered Stumpf's conviction entered on his guilty plea unconstitutional, conflicts with decisions of this Court.

This Court has held that there is no due process violation where the prosecution fails to provide "inconsistent" evidence prior to the entry of a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (rejecting claim of constitutional obligation to provide impeachment evidence during plea bargaining process). If a conviction may not be set aside because impeachment evidence was not provided to the defendant before entering a guilty plea, then there can be no right to have evidence that is not yet in existence considered at the plea and sentencing hearings. This is not a case in which the alleged misconduct of the State calls into question the fundamental fairness of the conduct of Stumpf's sentencing hearing. And, because Stumpf's claim of prosecutorial "misconduct" or "inconsistency" relative to *Stumpf's* conviction is based on evidence that did not exist at the time of his plea and sentencing hearing, then it amounts to a claim that he has a right to have the State vacate his guilty plea to the charged offense simply because evidence later comes to light that might have been helpful to him had he gone to trial.

Notably, the Sixth Circuit held that Stumpf "clearly has a due process claim even though [the allegedly inconsistent evidence] was not available at the time of his trial." 367 F. 3d at 613, at Appendix 39a. The panel majority's holding that *Stumpf's* due process rights were violated *retroactively* by the use of newly discovered inconsistent evidence at Stumpf's codefendant's *subsequent* trial goes well beyond this Court's and other circuits' cases dealing with the prosecutor's use of false evidence at a defendant's trial. This Court has not held that inconsistent prosecution theories or evidence, as opposed to presenting testimony the prosecution knows to be false, states a claim for a due process violation of a defendant's right to a fair trial. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor failed to correct testimony he knew to be false); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (knowing presentation of false testimony).

In granting Stumpf relief on due process grounds, the Sixth Circuit claimed to "join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." *Stumpf v. Mitchell*, 367 F. 3d at 611. Yet the Sixth Circuit did not acknowledge, let alone discuss, an obviously important procedural distinction, namely, that none of the cases that it relied upon from its sister circuits concerned defendants who pled guilty at trial and later sought to withdraw their pleas based on the state's allegedly inconsistent prosecution of codefendants. See *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000) (first convicted codefendant was granted a writ of habeas corpus where his conviction and that of the second codefendant were based on inconsistent testimony of one witness as to who actually killed the victims, and the State selectively presented two

different stories from that witness at the two trials);[2] *Thompson v. Calderon*, 120 F.3d 1045, 1056, 1058-59 (9th Cir. 1997) (en banc)[3] (opining that first convicted codefendant was denied due process at his trial when State introduced testimony of one jailhouse informant that pointed to Thompson as killer, but State had presented different jailhouse informant's testimony at the earlier pretrial proceedings and at the subsequent trial of Thompson's codefendant, pointing to the *codefendant* as the killer), vacated on other grounds, 523 U.S. 538 (1998); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., specially concurring)[4] (suggesting that due process rights of second codefendant were violated when State obtained conviction of first codefendant at trial on the theory that he committed the murder alone, and at the second codefendant's trial, argued that the second codefendant must have helped the first to commit the murder; judge noted that prosecutor must have obtained second codefendant's conviction based on evidence he did not believe); but cf. *United States v. Dickerson*, 248 F.3d 1036, 1043-44 (11th Cir. 2001) ("In

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[2] Cf. *Clay v. Bowersox*, 367 F.3d 993, 1004 (8th Cir. 2004) (rejecting due process claim based on allegedly contradictory prosecution theories during prosecutor's closing arguments, where evidence left open the possibility that either of the two codefendants could have been the triggerman).

[3] A majority of the judges on the Ninth Circuit en banc panel did not join in the portion of the opinion finding a due process violation. See *Thompson v. Calderon*, 120 F.3d at 1063-64 (Tashima, J., joined by Thomas, J., concurring); 120 F.3d at 1066-73 (Kozinski, J., joined by Nelson, J., dissenting). The majority opinion decided the case based on an ineffective assistance of counsel claim. 120 F.3d at 1051-56. Cf. *Nguyen v. Lindsey*, 232 F.3d 1236, 1240-41 (9th Cir. 2000) (where both defendants could be guilty of murder of bystander during gang warfare, no due process claim based on inconsistent prosecution theories).

[4] The majority in *Drake v. Kemp* decided the case on other grounds—namely, that a new trial was warranted because the burden of proof had been shifted to the defendant and the prosecutor made an improper closing argument during the sentencing phase of the trial. See 762 F.2d at 1451.

contrast, *neither the Supreme Court nor this court has addressed the constitutional implications of inconsistent litigation positions taken by the Government against defendants being tried separately for the same crime*. The [*United States v. Kattar*, 840 F.2d 118, 129 n.7 (1st Cir. 1988)] court recognized the difference between . . . the presentation of false testimony [and] . . . the Government's differing litigation positions . . .") (emphasis supplied); *United States v. Higgs*, 353 F.3d 281, 326-27 (4th Cir. 2003) (citing *Groose*, above, but noting that there was no inconsistency in the case before the court because the evidence showed that the two codefendants were equal partners in crime).

Moreover, even if the Sixth Circuit did join some of its sister circuits, in doing so it exacerbated a conflict with the Fifth Circuit. In *Nichols v. Scott*, 69 F.3d 1255, 1268-69, 1273-74 (5th Cir. 1995), the Fifth Circuit rejected a due process claim based on inconsistent prosecution theories. There, both codefendants shot at the victim, but it was not clear whose bullet killed the victim. The first codefendant pled guilty and, at sentencing, the prosecution argued that he was the triggerman. Later, Nichols was tried to a jury on the theory that he was the shooter. The court held that Nichols—the second-tried defendant—had no due process claim because the evidence presented at Nichols's trial was not factually false, and the State's argument at sentencing that Nichols fatally shot the victim did not affect the reliability of Nichols' trial. Under Texas law, both defendants could be convicted and sentenced to death for their participation in the robbery and murder of the victim. Accord, *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994) (the first-tried codefendant, Jacobs, was not deprived of due process when the prosecution stated in the second codefendant's trial that based on further investigation, the State no longer believed that Jacobs—the first codefendant—was the triggerman), *cert. denied*, 513 U.S. 1067 (1995). See also *Shaw v.*

Terhune, 380 F.3d 473, 475 (9th Cir. 2004) (new opinion on rehearing)[5] (not reaching issue of whether prosecution's use, at the separate trials of two codefendants, of inconsistent theories about the identity of the robber who held bystander at gunpoint violated the first-tried defendant's due process rights; court held that *assuming* it could be a due process violation, the use of inconsistent theories did not entitle first defendant to writ of habeas corpus because there was sufficient evidence upon which the jury could have convicted Shaw without implicating the inconsistent theories).

In short, the circuits are inconsistent in their treatment of inconsistent theories. That split merits this Court's review. Review is particularly warranted here because the Sixth Circuit panel below created a right to vacate a guilty plea not only when there is inconsistency, but even when that "inconsistency" arises solely from newly discovered evidence that was not available at the time the plea-based conviction became final.

As the dissenting judge on the Sixth Circuit panel observed, "[h]owever flawed a defendant's guilty plea might be, it cannot constitute a contradictory prosecutorial theory of guilt as required in *Groose*." 367 F.3d at 621, n.2 (Boggs, C.J., dissenting), at Appendix 54a. As the dissenting judge also noted, the record does not show that the prosecutor ". . . was remiss in relying on Stumpf's acknowledgment of guilt." 367 F.3d at 620, at Appendix 52a. Simply stated, the

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[5] The dissenting Sixth Circuit judge in *Stumpf* relied upon an earlier opinion in *Shaw v. Terhune*, above, which concluded that the facts stated showed no due process violation. See 367 F.3d at 621, at Appendix 54a (Boggs, J., dissenting), citing *Shaw v. Terhune*, 353 F.3d 697 (9th Cir. 2003), opinion withdrawn by 2003 U.S. App. LEXIS 27901 (9th Cir., Aug. 10, 2004). The Ninth Circuit panel in *Shaw v. Terhune* withdrew its earlier opinion when that panel issued its decision on rehearing on August 10, 2004. See 2003 U.S. App. LEXIS 25895.

newly discovered evidence did not undermine confidence in the correctness of Stumpf's conviction based on *his guilty plea*.

Because the due process right that the Sixth Circuit posited in this case arises out of a defendant's right to a fair trial, see, e.g., *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965), it is not readily applied to a claim seeking to vacate a guilty plea, which is an "admission that [the accused] committed the crime charged against him," see *North Carolina v. Alford*, 400 U.S. 25, 32 (1970). A trial involves the jury's (or judge's) evaluating the prosecutor's theory of the case based on the evidence presented. If a prosecutor who has the same evidence at hand deliberately presents one version of the facts in one codefendant's trial, and presents a diametrically opposed version of the facts in the second codefendant's trial (i.e., not based on any newly discovered evidence), it may arguably mislead the finder of fact, at least in the second case. By contrast, ordinarily there is no "trial" when a court accepts a defendant's guilty plea, which admits that the defendant committed the crime charged. The Sixth Circuit panel majority's decision creates a right of a convicted defendant to set aside his guilty plea when he can show that the prosecution obtained a conviction of a codefendant at trial by relying on evidence that was "inconsistent" with the factual basis for the first defendant's guilty plea.[6]

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[6] Although under Ohio law the State was required to produce independent evidence to corroborate Stumpf's guilty plea to aggravated, capital murder, *see* O.R.C. 2945.06, there is no decision of this Court or any other federal court of appeals that such a requirement is a basic element of due process. *See Baker v. Estelle*, 715 F.2d 1031, 1036 (5th Cir. 1983) (no federal constitutional question raised by trial court's alleged failure to comply with state statute that required evidence to corroborate guilty plea).

Stumpf was convicted on his own guilty plea, not on any "false" evidence. At most, there are two versions of what happened on the day of the murder and which of the two codefendants, Stumpf or Wesley actually fired the shots that killed Mrs. Stout. Those are: Stumpf's version (where Stumpf shot Mr. Stout, swapped guns with Wesley, and Wesley shot Mrs. Stout with Stumpf's gun) and the codefendant Wesley's story (where Stumpf did all of the shooting). The sentencing panel heard Stumpf's version of events (and the ballistics evidence which showed that Stumpf's gun was the murder weapon), and rejected Stumpf's version of the facts. And, during the later hearing on Stumpf's motion to vacate his plea, that same panel (minus the judge who had died since Stumpf's sentencing hearing) also had before it the transcript of Stumpf's codefendant's cellmate at the codefendant's trial—the newly-discovered evidence on which Stumpf relied in seeking to vacate his plea. See 367 F.3d at 617, at Appendix 46a. That panel of judges nevertheless rejected Stumpf's request to vacate his plea, and so apparently were not persuaded that the newly discovered evidence cast doubt on the validity of Stumpf's conviction and sentence.

The Sixth Circuit panel majority's decision, holding that presenting at a second codefendant's trial newly discovered evidence inconsistent with the first codefendant's hearing on the factual basis for his guilty plea results in a due process violation, also effectively allows defendants convicted on a guilty plea to assert a (disfavored) federal habeas claim for newly discovered evidence without meeting the stricter standards for such a claim. See, e.g., 367 F.3d at 622, at Appendix 55a-56a (Boggs, dissenting) ("[a]t most, the *existence* of [the cellmate's] statement could be argued to have rendered the conviction [of Stumpf] unreliable, but then our analysis would simply be that of any newly discovered evidence, which proceeds against a more difficult background . . ."). The panel majority's approach contradicts

this Court's rule in *Herrera v. Collins*, 506 U.S. 390, 400 (1993), that habeas relief is *not* the proper remedy for a claim of judicial error based on newly discovered evidence, absent some constitutional flaw in the trial proceedings. Cf. *Thompson v. Calderon*, 120 F.3d at 1058 (recognizing that when new evidence comes to light, there can be no due process violation based on inconsistent evidence or theory of prosecution); see also *United States v. Sharpe*, 193 F.3d 852, 872 (5th Cir. 1999) (citing *Thompson*, court held that the government's changing its theory of who the triggerman was at the second trial was not a due process violation but simply represented "... the presentation of new and significant evidence that justified the prosecution in question."). As the dissenting judge on the panel noted, "[i]t would indeed be bizarre if [the cellmate's] statement could not undermine Stumpf's conviction by its own force, but introducing it into another proceeding could do so." 367 F.3d at 622, at Appendix 55a-56a. And, here, the newly discovered evidence that Stumpf relied upon in seeking to withdraw his plea did not tend to show that Stumpf was "actually innocent," because, as the Sixth Circuit admitted, the State was not required to prove that Stumpf was the actual shooter in order to convict him for aggravated murder under Ohio law. See 367 F.3d at 614, at Appendix 42a.

Finally, the Sixth Circuit's unprecedented decision expanding the grounds for collaterally attacking in federal habeas corpus state criminal convictions entered on pleas of guilty has broad potential application to convictions based on guilty pleas in non-capital cases as well as death penalty cases. *See* Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2000, Table 4-2 (noting that ninety-five percent of state felony convictions in 2000 were entered by guilty pleas). The Sixth Circuit essentially held that Stumpf's conviction and death sentence must be set aside because Stumpf's guilty plea was "mistaken" (by virtue of Stumpf's being misinformed about the element of specific

intent before entering his plea, or of being ignorant of evidence later obtained by the State that could have aided his defense). But defendants sometimes plead guilty while professing their innocence, regardless of what they think the State must, can, or will prove, and often come to believe after-the-fact that pleading guilty was a big mistake. In granting Stumpf relief, the Sixth Circuit has "obliterate[ed] the distinction between 'involuntary' pleas and "misinformed or even uninformed" ones, and has failed to recognize that "[o]nce all those categories have been lumped together, the cases within them are not at all rare, but indeed exceedingly numerous." *Bousley v. United States*, 523 U.S. 614, 632-633 (1998) (Scalia, J., dissenting).

In the alternative, even if this Court determines not to grant certiorari to review the State's second proposition, summary reversal is warranted here. As discussed above, the Sixth Circuit's decision is not supported by the decisions of the other courts of appeals that it cites, and is inconsistent with this Court's pronouncements in *Herrera v. Collins*, above (habeas relief ordinarily is *not* the proper remedy for a claim based on newly discovered evidence), and *United States v. Ruiz*, above (rejecting claim of constitutional obligation to provide impeachment evidence during plea bargaining process).

CONCLUSION

For all of the above reasons, the Court should grant the State's petition and review the decision of the Sixth Circuit.

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